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Regional Emergency Medical Services, Inc. *and* National Emergency Medical Services Association, Petitioner. Case 7–RC–23217

May 21, 2009

DECISION AND DIRECTION

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The National Labor Relations Board¹ has considered the determinative challenges in an election held October 17, 2008, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 20 for and 19 against the Petitioner, with six challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings and recommendations² only to the extent consistent with this Decision.

The only issue before the Board is whether the hearing officer correctly found that contingent emergency technician (EMT) Tara Dibler belonged in the stipulated bargaining unit and that the challenge to her ballot should be overruled. The three-part test set forth in Caesar's Tahoe, 337 NLRB 1096 (2002), applies to the resolution of challenged ballots in cases involving stipulated units. Under this test, if the objective intent of the parties is expressed in clear and unambiguous language in the unit stipulation, then the Board will enforce the agreement. If the language of the stipulation is ambiguous with respect to an employee's eligibility, then it is appropriate for the Board to examine extrinsic evidence to interpret the

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *New Process Steel, L.P. v. NLRB*, _____F.3d ____, 2009 WL 1162556 (7th Cir. May 1, 2009); *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), pet. for rehearing denied (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, _____F.3d ____, 2009 WL 1162574 (D.C. Cir. May 1, 2009).

² In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule the challenge to the ballot of Robert Pietraszewski and to sustain challenges to the ballots of Robert Beggs, Kevin Brown, Cassandra Crowley, and Edward Kraszewski.

stipulation.³ If the intent of the stipulation still cannot be determined, then the Board will decide the eligibility of the challenged voter using traditional community-of-interest criteria. Id. at 1097. As discussed below, we find that the language of the parties' unit stipulation reflects their clear and unambiguous intent to exclude contingent employees. We therefore reverse the hearing officer and sustain the challenge to Dibler's ballot.

The parties stipulated that the bargaining unit includes, in relevant part, "all full-time and regular part-time emergency medical technicians." The unit description in the Union's election petition was different, including "all full-time, part-time *and contingent* EMT's" (emphasis added). The Employer uses the terms "contingent" and "casual" interchangeably for a distinct classification of part-time EMTs and other employees who work less than 16 hours per pay period and do not have a regularly assigned work schedule.

The Board agent challenged Dibler's ballot because her name was not on the Employer-prepared voting eligibility list. The hearing officer recommended that the challenge be overruled. She found that the unit stipulation was ambiguous on its face with respect to the eligibility of contingent EMTs and that extrinsic evidence was insufficient to demonstrate the parties' intent on this point. Applying traditional community-of-interest principles, the hearing officer recommended that Dibler be included in the bargaining unit.

In exceptions, the Employer argues, inter alia, that the hearing officer erred in failing to find that *Northwest Community Hospital*, 331 NLRB 307 (2000), is controlling and requires a finding that the unit stipulation unambiguously establishes the parties' intent to exclude contingent employees such as Dibler from the bargaining unit. We agree.

In Northwest Community Hospital, the employer had three distinct categories of maintenance employees: full-time, part-time, and hourly on-call. The Union petitioned for an election in a bargaining unit including all three categories, but the parties' unit stipulation specifically included only "regular full-time and regular part-time employees." The Board concluded that the stipulation reflected the parties' clear and unambiguous intent to include only full-time and part-time employees in the unit and to exclude hourly on-call employees, even though the stipulation did not specifically exclude those employees or generally exclude "all other employees." The Board reasoned that "in light of the evidence of the

³ However, the Board will not enforce bargaining unit stipulations when the parties' intent is contrary to any statutory provision or established Board policy. This exception to the general rule that unit stipulations should be enforced is not at issue in the present case.

distinct nature of part-time employment versus hourly on-call employment, where the Petitioner had specific knowledge of this distinction, some significance must be attributed to the Petitioner's agreement to include only 'regular full-time and regular part-time employees." 331 NLRB at 308. The Board particularly noted that the Petitioner originally sought to include "on-call employees" but abandoned this unit description in the stipulation. Id.

In the instant case, the Employer maintains three distinct categories of EMT employees: full-time, part-time, and contingent. Contingent employees were expressly included in the Union's petition but not mentioned in the parties' unit stipulation, which expressly included only full-time and part-time EMTs. As in Northwest Community Hospital, supra, weight should be given to the fact that the Petitioner was aware of the distinct contingent EMT classification, included that classification in the petition's unit description, but stipulated to a unit description that failed to mention contingent employees. Although the stipulation did not exclude "all other employees," we find that it nevertheless shows the parties' clear and unambiguous intent to include only full-time and part-time EMTs in the bargaining unit and to exclude contingent EMTs. Accordingly, we conclude that contingent EMT Dibler was excluded from the stipulated unit, and we sustain the challenge to her ballot on this basis.4

DIRECTION

IT IS DIRECTED that the Regional Director for Region 7 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Robert Pietraszewski. The Regional Director shall then prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. May 21, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Chairman Liebman agrees that *Northwest Community Hospital* is extant Board precedent that supports sustaining the challenge to Dibler's ballot on the grounds that the unit stipulation is clear and unambiguous. She notes that she did not participate in *Northwest Community Hospital* and would treat the stipulations in that case and in the present case as facially ambiguous. However, she would find that the different unit description in the Union's election petition is extrinsic evidence sufficient to establish the parties' clear intent to exclude contingent/casual employees.

⁴ We therefore do not pass on the Employer's exceptions to the hearing officer's interpretation of extrinsic evidence of the parties' intent, to her community-of-interest analysis, and to her determination that Dibler's weekly average of hours worked established her voting eligibility under the formula discussed in *Davison-Paxon*, 185 NLRB 21, 23–24 (1970).